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ABSTRACT

The commitment of the Assistant Attorney General of the Civil Rights Division, in the U.S. Department of Justice, to the enforcement of the Rehabilitation Act of 1973 is described. Recent federal initiatives under this act to advance the rights of disabled people in terms of employment, the rights of handicapped infants, and the enforcement of regulations for Section 504 (which prevents discrimination in federal programs or activities) are noted. Also revealed is the controversy with the disabled community over regulations for Section 504, including the department's efforts to conform this regulation with the Supreme Court's interpretation in Southeastern Community College v. Davis and high-lighting the regulation's complaint procedure. A summary of the Civil Rights Division's activities in monitoring other agencies' issuance of 504 regulations concludes the paper. (CL)

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Department of Justice

REMARKS

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

PARALYZED VETERANS OF AMERICA
DISABILITY RIGHTS CONFERENCE

THE NATIONAL LAWYERS CLUB
WASHINGTON, D.C.
THURSDAY, APRIL 5, 1984
12:00 P.M.

EC172548

Good afternoon. I am delighted to have this opportunity to speak with you today about the Reagan Administration's enforcement of section 504 and other Federal statutes protecting the rights of disabled people in America. Let me preface my remarks with the open acknowledgement that PVA is as effective a voice for the interests of its membership as any organization that I have dealt with since becoming Assistant Attorney General. I am not going to stand before you and pretend that we don't have some differences. Clearly, we do--although, my strong impression is that they are fewer and far less dramatic than is generally reported.

Be that as it may, my focus today is not on those differences, but rather on our shared commitment to the effective enforcement of the Rehabilitation Act. This civil rights statute became law just over ten years ago. Title V of the Act is generally recognized a decade later as one of the major legislative protections of individual rights in the Federal Code. Many would say--and with good reason--that it rivals the landmark Civil Rights Act of 1964, not only in its breadth but also in its effect.

Title V, and particularly section 504, have been a source of considerable Federal action over the past several years. Regretably, because some of that activity has generated heated public controversy, much that this Administration has accomplished to advance the rights of disabled people has been obscured by the rhetoric. The fact is that the record compiled in enforcing Title V is one of which we are justifiably proud. Let me highlight for you some of our recent initiatives, describe a few of the actions we have taken in representing the government in the courts, comment briefly on our regulatory activity, and then mention quickly our coordination activity with other Federal agencies.

The Federal government's amicus participation in the Supreme Court case of Consolidated Rail Corporation v. Darrone, is high on the list of accomplishments. Conrail is the first Supreme Court case involving section 504 as it applies to employment. In Conrail, the government took the position that section 504 forbids employment discrimination in all federally assisted programs, irrespective of whether a primary purpose of the Federal funding was to promote or assist employment. We also argued that section 504 may be enforced by a private right of action and that such compensatory relief as back pay was available to private plaintiffs in such a lawsuit.

The Court held that the protections of section 504 are not limited to those situations where a primary purpose of the Federal grant program is to provide employment. Following another of its recent decisions (Guardians), it also held that back pay was available as a remedy for intentional discrimination. I am proud to have presented the argument of the Federal Government in the Supreme Court and to have been able to contribute to the Court's unanimous vindication of the interests of handicapped persons under section 504. I might note parenthetically that the Federal government has steadfastly remained an ally of disabled people on the employment issue, maintaining its view of broad employment coverage even in the face of contrary decisions by four circuit courts of appeal. It is always nice to be told by the Highest Court that you were right all along.

On another front, the Reagan Administration has acted boldly to protect the rights of handicapped infants. In April 1982, President Reagan issued a ringing endorsement of section 504 and put this Administration at the forefront of efforts to stop hospitals from denying needed health care to infants simply because they are handicapped. One month later, the Department of Health and Human Services issued a notice to 7,000 hospitals in this country, stating that section 504 prohibited them from withholding nutritional sustenance or

medical or surgical treatment from handicapped infants when this withholding was based on the infant's handicapping condition. In the ensuing two years, HHS and the Justice Department have acted through the regulatory process and in the courts to ensure that handicapped newborns are not allowed to die because of physical or mental defects at birth. Admittedly, the legal questions raised in this area are novel and complex, and discussion of the issues understandably evokes strong emotions. The Administration is committed, however, to its position. Section 504 is a nondiscrimination statute, and by its terms it protects the youngest among us, to the same extent as the oldest, against the withholding of needed medical treatment because of some misguided "quality of life" assessment due to a condition of handicap.

A divided panel of the Second Circuit Court of Appeals has given a more restrictive reading to section 504 in U.S. v. University Hospital of SUNY at Stony Brook, the now famous "Baby Jane Doe" case. There, by a 2-1 vote, the Court denied HHS access to the hospital records of a severely handicapped newborn infant. The majority opinion stated that the government could not seek information on Baby Jane Doe because "Congress never contemplated that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborns when the statute was enacted in 1973, when

it was amended in 1974, or at any subsequent time." Judge Winter, in dissent, could not accept so miserly an interpretation of the statute's coverage, finding ample support for the Government's position.

We have petitioned the Court to rehear the case en banc--that is with all members of the Second Circuit sitting. As I am sure many of you know, the Department of Health and Human Services has issued regulations in this area that set up a thoughtful and constructive review process for dealing with claims of infanticide and "Baby Doe" type allegations under section 504--regulations, I might add, that met with the general approval of the handicapped community as well as large segments of the medical profession. There is thus much riding on the Second Circuit case.

Let me now turn briefly to our activities on the regulatory front. In 1978, Congress amended section 504 by extending its nondiscrimination guarantee to the Federal Executive Branch of the Federal Government. The 1978 amendment applies to federally-conducted programs and activities, and requires that each Executive agency prepare rules implementing section 504. The Civil Rights Division has dual responsibilities in this area: We are responsible for the

Department of Justice's own section 504 regulation and, under a Presidential executive order, we are responsible for ensuring that the other Federal agencies issue consistent section 504 regulations.

On December 16, 1983, the Attorney General published a proposed section 504 rule for the Department's own programs. We have held the rule open for comment for 120 days, an unusually long period, to ensure that we provide the public with enough time to consider our proposal.

Shortly after the rule was issued, we received a number of preliminary comments from the disability-rights community, including PVA. The tone and nature of the comments--a number of the letters expressed the view that the writers were "shocked and appalled" at our action--indicated to us that some of the regulatory provisions we had proposed were being misunderstood. I personally met with representatives of the disability community and engaged in a brief but intensive review of our proposed rule. As a result of these discussions, the Department issued a Supplemental Notice on March 1, 1984.

The very fact of this second publication is, I think, noteworthy in itself. One of the marks of a government that is committed to protecting the civil rights of its citizens is its willingness to listen to their concerns and criticism and its ability to respond in an appropriate manner. In this case the Civil Rights Division entered into a dialogue on the appropriate interpretation of section 504 and took the unusual step of issuing supplementary regulatory language to clarify the public record and to attempt to meet the concerns of the disability community.

Let me review what occurred. The Justice Department's proposed section 504 regulation states that the Department, in making its programs accessible to handicapped persons, need not take such measures as would result in a fundamental alteration in the nature of its programs and activities, or in undue financial and administrative burdens. At the same time, the proposed rule does require that action of a less dramatic nature, aimed at providing handicapped persons accessibility to Department programs to the extent practicable, must be taken in such circumstances. This regulatory provision became the focal point of attention for a number of disability-rights advocates.

We based the "undue burden" provision on the Supreme Court's unanimous decision in Southeastern Community College v. Davis. In Davis, the Court held that section 504 does not require recipients of federal assistance to make program modifications at the request of handicapped persons if to do so would result in a fundamental alteration in the nature of a program or undue financial and administrative burdens. That outer limit on the 504 accommodation requirement has, since Davis, received judicial recognition in circuit courts of appeals as well. Thus, in American Public Transit Association v. Lewis, Judge Abner Mikva of the D.C. Circuit Court found that regulations implementing section 504 could require "modest expenditures" but not "extremely heavy financial burdens." In Dopico v. Goldschmidt, the Second Circuit reaffirmed that section 504 could not require "massive expenditures to satisfy an accommodation request." In New Mexico Association for Retarded Citizens v. New Mexico, the Tenth Circuit likewise made the point that section 504 could not be read to impose accommodation requirements that would "jeopardize the overall viability of the program."

Inclusion, then, in our proposed regulations of "undue burdens" language was an effort to conform the Department's section 504 regulation with the Supreme Court's interpretation of the statute in Davis, as well as the decisions of the lower

courts following Davis. In short, we did not invent the "fundamental alteration" or the "undue burdens" language. Where the Supreme Court--which is, after all, the final arbiter of these section 504 issues--where the Court has spoken, and spoken clearly, we have a responsibility to follow its mandate in our rulemaking process.

At the same time, we cannot, and will not, disregard concerns raised by the disability community as to how our proposed language might be misread by some as relaxing the antidiscrimination provision of section 504 as applied to federally-conducted programs. If the courts have recognized "undue burdens" as a legitimate defense under the statute, we want to be sure the constraints on its use are well understood and clearly stated. Accordingly, working closely with leaders of the disability community, we developed and have published for comment a Supplemental Notice, setting out six principles of interpretion that are to accompany the "fundamental alterations" and "undue financial and administrative burdens" language.

First, because of the extensive resources and capabilities that could properly be drawn upon for section 504 purposes by a large Federal agency like the Department of Justice, we explicitly acknowledge that in most cases making

a Department program accessible will not constitute an undue burden.

Second, the burden of proving that the accommodation request will result in a fundamental alteration or an undue burden has been placed squarely on the Department of Justice, not on the handicapped person.

Third, in determining whether financial and administrative burdens are undue, the Department is to consider all Department resources available for use in the funding and operation of the conducted program.

Representatives of the disability community had suggested that the agency's budget "as a whole" would be the appropriate measure. We had concerns with such an approach principally because many parts of the Department's budget are earmarked for specific purposes and are simply not available for use in making the Department's programs accessible to disabled persons. For example, funds for the operation of the Bureau of Prisons are unavailable for defraying the cost of a sign language interpreter at a deportation hearing conducted by the Immigration and Naturalization Service. The formulation we have proposed--all Department resources available for use in the funding and operation of the conducted program--looks

beyond a discrete "line item" amount in the budget and requires that other available Department resources be considered as well.

Fourth, the "fundamental alteration"/"undue burdens" decision is to be made by the Attorney General and must be accompanied by a written statement of reasons for reaching such a conclusion.

Fifth, if a disabled person disagrees with the Attorney General's finding, he or she can file a complaint under the complaint procedures established by the proposed regulation. A significant feature of this complaint adjudication procedure is the availability of a hearing before an independent administrative law judge under the due process protections of the Administrative Procedure Act.

Sixth, and finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or constitute undue financial and administrative burdens, the Department must still take action, short of that outer limit, that will open participation in the Department's program to disabled persons to the extent possible.

Time does not permit me today to go through the other provisions of our proposed regulation. I am particularly pleased with the regulation's complaint procedure. It provides every disabled person who believes that he or she has been discriminated against in a Department program or activity with the opportunity to have the grievance reviewed in a fair, independent process. It successfully adapts the procedures used in section 504 for federally-assisted programs to section 504 federally-conducted programs--and does so despite the lack of statutory guidance and the meager legislative history on how the statute should be enforced.

I invite all of you, personally and on behalf of the organizations that you represent, to read our proposed rule and our Supplemental Notice and to provide written comments to us. The comment period is open until April 16, 1984.

In addition to issuing Justice's own section 504 regulation, the Civil Rights Division has moved to ensure that other Executive agencies complete the process of issuing their own section 504 rules. There are over ninety Federal entities subject to the 1978 amendment; each one must issue section 504 federally-conducted rules. Agencies ranging from the Treasury Department and Health and Human Services to the Marine Mammal Commission, the American Battle Monuments Commission, and the

Navaho and Hopi Relocation Board are within this group. Our responsibility is not only to spur these agencies to issue their regulations but also to ensure that there is a consistency throughout the Federal government in this area of 504 enforcement. Through our coordination activity under the Executive Order, we are intent on avoiding a regulatory patchwork quilt, achieving instead a coherent statement of the Federal Executive Branch's commitment to remove from all federally-conducted programs whatever unlawful discrimination exists against the citizens of this country who are handicapped.

To this end, we sent a prototype regulation to these agencies over a year ago. We do not expect each agency to adopt this prototype word for word. The prototype is a model, a regulatory framework that each Federal entity can tailor to the peculiarities of its own programs and activities.

So far, twenty agencies have published section 504 regulations in the Federal Register for comment. One agency, the Department of Defense, has issued a final section 504 rule, which it proposes to amend consistent with the Justice Department's prototype. The Civil Rights Division has received and reviewed over 35 additional proposed rules. We have contacted the remaining Executive agencies to speed their

regulation development. Congress' extension of section 504 to Federal agencies will have only limited meaning until these regulations are issued. We are therefore committed to expediting their issuance and will continue to prod the Federal Executive Branch to action.

Let me mention one further point. My responsibilities concerning the rights of disabled people extend beyond enforcement authority under section 504. As Chairperson of the Architectural and Transportation Barriers Compliance Board and the Interagency Coordinating Council, I am intimately involved in a range of issues affecting disabled people. I would like to spotlight for you one project in this area.

The existence of a number of differing standards for what makes buildings accessible has bedeviled the Federal government for years. The ATBCB has worked with HUD, GSA, Defense, and the U.S. Postal Service to develop a unified standard of accessibility for use under the Architectural Barriers Act of 1968. This project is now nearly complete. Within the next several months these four agencies will publish in the Federal Register a Uniform Federal Accessibility Standard (UFAS for those of you that prefer acronyms). This standard will be consistent with the Board's Minimum Accessibility Guidelines and Requirements that were published in December 1982. It will

be clearer than existing standards; more specific than existing standards; and more comprehensive than existing standards. For example, not only will UFAS provide technical information on what makes a primary entrance accessible, it will also set forth "scoping" standards on how many primary entrances an accessible building should have. Most important, however, UFAS will provide a uniform Federal answer to the question of what makes a building accessible. Once this standard is in place, it will serve as a measure of compliance not only with the Architectural Barriers Act, but also with section 504 as well.

My remarks today cover but a part of the many activities being undertaken by this Administration to protect the rights of this country's disabled persons. I have not described in any detail the work being done by the Architectural and Transportation Barriers Compliance Board. And, time does not permit a discussion of the efforts underway in the Administration to better coordinate various government programs designed to benefit handicapped persons, so that the Federal energies in this area can be brought together to work in unison on a number of important disability projects--rather than continuing to operate, as is too often the case, at cross-purposes without knowledge of what other efforts are underway. Nor have I discussed the Civil Rights Division's enforcement activities on behalf of the mentally ill and

mentally retarded under the Civil Rights of Institutionalized Persons Act. We have initiated a most ambitious program in this area on behalf of those who are institutionalized, and it is producing positive results.

When I joined the Administration some three years ago, I brought to my position an awareness of the barriers facing those in our society who are disabled that comes from a close personal relationship with someone who is handicapped. I know now--three years later--that I knew far too little then. There are, of course, many, many Americans who are less sensitive to, concerned about, or simply cognizant of, the needs of disabled people than I. They need to be educated--to learn that we have no second-class citizens in our society, least of all those among us who are disabled--and to be brought into the ongoing struggle to remove the barriers, both attitudinal and physical, that daily confront handicapped persons.

This Administration has joined that struggle. There are those among you who have disagreed with some actions we have taken, and I expect I will hear from you again. But the disagreement has been without rancor, and we have been able, for the most part, through an open and responsible dialogue, to find our way to a common ground. That is, of course, as it should be. For, after all the harsh words are said, what

remains intact is our joint commitment to ensuring the provision of equal opportunity to all disabled people in this country. This Administration is dedicated to that end--and to working constructively with you and others in the disability community to achieving that end.

Thank you.